

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SAM ANDREWS' SONS,)	
)	
Respondent,)	Case Nos. 82-CE-171-EC
)	82-CE-210-EC
and)	83-CE-99-EC
)	
UNITED FARM WORKERS OF)	
AMERICA, AFL-CIO,)	11 ALRB No. 14
)	
Charging Party.)	

DECISION AND ORDER

On August 6, 1984, Administrative Law Judge (ALJ) James Wolpman issued the attached Decision in this proceeding. Thereafter, Respondent Sam Andrews' Sons (Respondent) and General Counsel each timely filed exceptions to the ALJ' s Decision and a supporting brief, and Respondent filed a reply brief.

Pursuant to the provisions of Labor Code section 1146,^{1/} the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member panel.^{2/}

The Board has considered the record and the ALJ ' s Decision in light of the parties' exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALJ only to the extent consistent herewith.

^{1/}All section references herein are to the California Labor Code unless otherwise specified.

^{2/}The signatures of Board members in all Board Decisions appear with the signature of the chairperson first (if participating), followed by the signatures of the participating Board members in order of their seniority.

The amended complaint in this matter alleged, inter alia, that Respondent had violated Labor Code section 1153(e) and (a) by unilaterally changing its established practice regarding recall of its lettuce Crew No. 5 during the Spring 1983 lettuce harvest in Bakersfield, and by unilaterally changing the working conditions of Respondent's tractor drivers by assigning tractor driving work to foreman Rudy Angulo's son Lawrence Angulo in the summer of 1982.

Failure to Recall Lettuce Harvest Crew No. 5

General Counsel alleged that in the Bakersfield Spring 1983 lettuce harvest Respondent changed its established practice by increasing the number of trios^{3/} in Crews No. 1 through No.5, instead of recalling Crew No. 5, thus depriving members of Crew No, 5 of the opportunity to work in the harvest. General Counsel introduced crew records for the years 1980-1983 showing the number of trios that worked in each crew during each week of the eight seasons from Spring 1980 through Fall 1983. The ALJ undertook an extensive analysis of the crew size and utilization data, making his own tables to compare the number of trios and the number of shifts worked each week of the 1980-1983 seasons. The ALJ found that the critical issue in determining whether an unlawful unilateral change had occurred was whether Respondent, in expanding Crews No. 1 through No. 4 and not recalling No. 5 during Spring 1983, had gone beyond the flexibility inherent in its crew size and utilization system

^{3/} Each trio is made up of two cutters and one packer

such that the failure to utilize Crew No. 5 constituted a change in established practice.

The ALJ concluded that although Spring 1983 was an unusual season,^{4/} Respondent had not exceeded the limits of the flexibility inherent in its established practice regarding crew size and utilization, and therefore had not committed a bargaining violation in failing to recall Crew No. 5. In its exceptions brief, General Counsel claimed that the ALJ improperly analyzed the payroll data by considering the number of trios each week in each individual crew rather than considering the total number of trios in all crews. General Counsel also asserted that the ALJ should not have relied upon data from the Spring and Fall 1980 harvests because during those harvests Respondent was in the process of reorganizing its crews.^{5/}

We conclude that General Counsel has not shown that its analysis of the payroll data was more accurate than the ALJ's, nor that the ALJ improperly considered data from the 1980 seasons. The ALJ's analysis convincingly demonstrates that Respondent in its Spring 1983 season did not exceed the limits

^{4/} Because of unusually cool weather, the Spring 1983 harvest was abnormally long, lasting ten weeks (three more than any previous season and four more than the average) from mid-March to late May. The total number of shifts (i.e., the number of hours worked in a given work day, which could vary from 4 hours to 4 hours depending on production needs) exceeded any previous season by almost 1000; however, there was never a normal peak in the amount of lettuce -- that is, the volume was more stable than usual.

^{5/} The ALJ agreed with Respondent that the 1980 reorganization concerned only the method by which workers were selected for hire and had nothing to do with crew size or the number of crews utilized.

of the flexibility of its practice.^{6/} Therefore, we will dismiss the portion of the complaint alleging a unilateral change in crew size and utilization.

Assignment of Tractor Driver Work to Foreman's Son

Several of Respondent's tractor drivers testified that on a number of occasions during the summer of 1982 they observed foreman Rudy Angulo's 14-year-old son Lawrence "knocking borders" (using a tractor with a special disc to knock down the temporary earthen borders erected for irrigating fields). Respondent had a long-standing practice of employing children of foremen and supervisors in part-time work after school, on weekends, and during summers.^{7/} The drivers also testified that the work of knocking borders was usually performed by one particular driver, Patricio Parra, but that other drivers sometimes did such work. Rudy Angulo testified that he never instructed his son Lawrence

^{6/} The ALJ assumed, without discussing the issue, that crew size and utilization are mandatory subjects of bargaining. Although layoffs and recalls generally are mandatory subjects of bargaining (see 1 Morris, *The Developing Labor Law* (2d Ed. 1983) p. 801) the issue herein is not the issue ordinarily involved in layoff and recall matters – i.e., the order in which workers are laid off or recalled – because Respondent used a different seniority list within each crew, and no member of a higher-numbered crew could ever be recalled to a lower-numbered crew. The alleged change herein might be viewed as a transfer of work within Respondent's operations – i.e., a transfer of work normally performed by Crew No. 5 to other crews. A decision to transfer work within an employer's operations may, under certain circumstances, be a mandatory subject of bargaining. (Stone & Thomas (1975) 221 NLRB 573 [90 LRRM 1569].) However, because the evidence herein shows that Respondent did not change its established practice, we do not reach the question of whether such a change would be a subject of mandatory bargaining.

^{7/} This -practice was found nondiscriminatory in Sam Andrews' Sons (1983) 9 ALRB No. 21, ALJD pp. 67-68.

to knock borders or do other tractor work, although he sometimes told him to move tractors. He stated that he had seen his son knocking borders a couple of times, and that Lawrence had said he was just moving dirt around to get the feeling of what it was like. Angulo said that he immediately told his son to stop. Angulo also testified that the hours spent knocking borders would not always be recorded on an employee's time sheet if the employee was doing other work for most of the day.

The ALJ found that the issue of Lawrence Angulo being used to knock borders was really one of classification: whether through established practice certain work had come to belong exclusively to tractor drivers as part of their job classification. The ALJ reasoned that if no tractor driver's seniority had been affected -- that is, if all the drivers were working their maximum number of shifts at the time Lawrence was knocking borders -- then it would be difficult to conclude that Respondent had changed its established practice by using Lawrence to knock borders. The ALJ found, however, that Respondent's tractor driver pool had not been exhausted, and that during every week from June 1 through September 26, 1982, there were tractor drivers who were not working or who were working less than their normal number of hours per week. He concluded that, by allowing Lawrence Angulo to knock borders, Respondent altered its established practice of according tractor drivers the exclusive right to perform tractor work, thus violating Respondent's duty to bargain over changes concerning mandatory subjects of bargaining.

We find a number of errors in the ALJ's analysis of this issue. Although Respondent may have had an established practice generally to assign tractor driver work exclusively to workers classified as tractor drivers, Respondent also had an acknowledged practice of employing supervisors' children for part-time and summer work, and General Counsel made no showing that these children had not in the past been assigned to jobs "exclusively" performed by one particular classification of regular employees. Further, the evidence did not clearly show that before 1982 Lawrence Angulo had never performed any tractor work.^{8/} Thus, it is not clear that the occasional use of Lawrence to knock borders would have constituted a change in established practice. Moreover, although there was a substantial drop in the number of hours reported for knocking borders in 1982, that does not in itself show that Lawrence' spent a significant number of hours at that work, since testimony established that if workers knocked borders for a small portion of their day the hours would not be reported.

Finally, and most importantly, we find that Respondent's tractor driver payroll records do not support a finding that the working conditions of regular tractor drivers were changed as a result of Lawrence Angulo performing any tractor driving work.

From the 1981-1983 payroll records it appears that

^{8/} One driver testified that he could not recall whether he had ever seen Lawrence knocking borders prior to 1982. Another testified that he had "hardly never" seen the foreman's son knocking borders prior to that season.

borders are usually split in June and September and sometimes in August. In 1982, there were three 10-hour shifts reported for September, one for July, one for June, and none for August. Workers testified that they saw Angulo splitting borders "in the summer of 1982." One witness said he observed Angulo splitting borders in June 1982 and might have seen him in September also.

Tractor driver Eduardo Ramirez testified that in August 1982 three tractor drivers were laid off, and that a layoff at that time of year was not normal. However, we cannot attribute this layoff to any use of Angulo to knock borders. First, the witnesses did not testify that they observed Lawrence knocking borders in the month of August, but only in June and possibly September. Second, Patricio Parra, the primary person used to knock borders, worked his normal 50- to 60-hour work week during all of August 1982, but did not knock borders during that month. Finally, the evidence indicated that borders are split primarily in June and September, and not usually in August.

In the first three weeks of June 1982 Parra did not work at all, and Angulo worked 20, 22 and 40 hours respectively. Parra did not testify at the hearing, and there is no evidence as to why he did not work those first three weeks. However, more tractor drivers worked in June 1982 than in June 1981, and therefore Angulo's employment in June 1982 cannot be said to have decreased employment of regular tractor drivers for that month.

During the month of September, Respondent usually

employed 9 to 11 tractor drivers each week for 50 to 60 hours apiece. In the week ending September 12, 1982, tractor driver work was less than usual, with three drivers working five days, five drivers working four days, and one driver working three days.^{9/} However, we do not conclude that this slackening of work was due -- either wholly or partially -- to employment of Lawrence Angulo to knock borders. On the basis of one witness's testimony that he "might have" seen Angulo splitting borders in September, such a conclusion would be merely speculative. Instead, the evidence seems to indicate that there was a general slackening of work that week for other reasons.

After reviewing the payroll records and testimony herein, we find that General Counsel has not shown Lawrence Angulo's occasional employment at knocking borders had any effect upon the number of hours worked by regular tractor drivers, nor that such occasional employment constituted a deviation from Respondent's past practices. We conclude, therefore, that General Counsel has failed to prove that a unilateral change occurred in tractor drivers' working conditions, and we will dismiss the relevant portions of the complaint.

ORDER

Pursuant to section 1160.3 of the Agricultural Labor Relations Act, the Agricultural Labor Relations Board hereby

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^{9/} For the rest of the month, Respondent employed its usual 9 to 10 drivers each week, mostly for six days per week each,

orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated: June 26, 1985

JOHN P. MCCARTHY, Member

JORGE CARRILLO, Member

MEMBER WALDIE, Dissenting:

I am persuaded that the evidence supports both the allegation regarding the failure to recall Crew No. 5 as well as that pertaining to the assignment of tractor work to the foreman's minor son.

Failure to recall Crew No. 5

I would reverse the ALJ on this matter as *I* believe the General Counsel's exception to his dismissal of this charge to be well taken and well supported by the record testimony. I agree with the General Counsel's characterization that the issue is not, as seen by the ALJ, whether the failure to decrease the number of trios in the other crews and utilize Crew No. 5 was a change in policy. Rather, the issue is whether this employer deviated from past practice by increasing the number of trios in the other crews so as to avoid recalling Crew No. 5.

Payroll records demonstrate that in the Spring 1983 season, after Crews No. 1 through No. 4 had worked for one week,

the total number of trios working in those crews was increased by over 12 percent (from 41 to 47). During no previous season did as many as 47 trios work in those four crews, nor did any previous season witness so great an increase in trios as the 12 percent increase at issue here; for the first time, this employer chose to inflate the number of trios in existing crews rather than recall Crew No. 5 as had been the practice in previous seasons.^{1/} I therefore differ with the ALJ's characterization that the employer's past practice was not exceeded; indeed, its inflation of trios created a material change in a mandatory subject of bargaining -- crew size and utilization; I would, therefore, find a violation of section 1153(a)(e).

The Tractor Drivers

I conclude that the record supports the finding made by the ALJ that the use of the foreman's son, Lawrence Angulo, to "knock borders" adversely affected the assigned work of regular tractor drivers. The majority's reversal of the ALJ on this issue relies upon a conclusion that the work-hours of Patricio Parra, the tractor driver who usually performed the work of knocking borders,

^{1/} Although Respondent argued that it had no established policy in this regard, it did have a past practice, to wit, to bring in Crew No. 5 at precisely the same point in the season that in 1983 it decided to instead inflate the number of trios beyond any previous year's number. As the General Counsel persuasively illustrates in his brief in support of this exception, "...the expansion in size in each crew consisted of from one to three trios; all combined equaling 4 to 12 trios. These 4 to 12 trios would have comprised the typical size of Crew No. 5, which varied from 4 to 10 trios during the seasons from 1981 to 1983." (GC Brief, at p. 22.) Also the testimony of Eddie Rodriguez in GCX 8 when compared to that at RT:II:35 indicates the employer recruited larger crews in 1983 than previously, the increase conveniently equaling the size of Crew No. 5.

was not adversely affected. What the majority fails to consider is that other tractor drivers performed this work when required and that during the period at issue there were tractor drivers who had not been recalled. It is obvious that had the foreman not allowed his son to do the work, the regular tractor drivers would have worked greater hours or another would have been recalled to pick up the needed work. Whether one tractor driver was denied a job or another more hours of work because of the use of the foreman's son both demonstrate an adverse impact. I would uphold the ALJ's finding of a violation of section 1153(a)(e).

Dated: June 26, 1985

JEROME R. WALDIE, Member

CASE SUMMARY

SAM ANDREWS' SONS

11 ALRB No. 14

Case No. 82-CE-171-EC

ALJ Decision

The ALJ recommended dismissing the complaint's allegation that during the Spring 1983 lettuce harvest in Bakersfield the Employer violated its duty to bargain with the UFW by unilaterally changing its established practice of recalling its lettuce Crew No. 5. The ALJ concluded that although Spring 1983 was an abnormal season, lasting unusually long and requiring a greater total number of work shifts than previous seasons, the Employer did not exceed the limits of flexibility inherent in its established practice regarding crew size and utilization by expanding the size of Crews Nos. 1-4 instead of adding a fifth crew. Therefore, the ALJ concluded, the Employer did not commit a bargaining violation by failing to recall Crew No. 5.

The ALJ concluded that by allowing a foreman's son to perform certain tractor work in the summer of 1982, the Employer had altered its established practice of according its regular tractor drivers the exclusive right to perform tractor work, thus violating the Employer's duty to bargain over changes concerning mandatory subjects of bargaining.

Board Decision

The Board affirmed the ALJ's conclusion that the Employer's failure to recall lettuce Crew No. 5 in Spring 1983 did not constitute a bargaining violation.

However, the Board reversed the ALJ's conclusion that the Employer had committed a bargaining violation by assigning tractor driver work to the foreman's son. The Board found that the testimony and the Employer's payroll records did not support a finding that the working conditions of regular tractor drivers were changed as a result of the foreman's son performing any occasional tractor work, nor that such occasional employment would have constituted a deviation from the Employer's past practice of employing supervisors' children for part-time and summer work.

Finding no violations, the Board dismissed the complaint in its entirety.

Member Waldie's Dissent

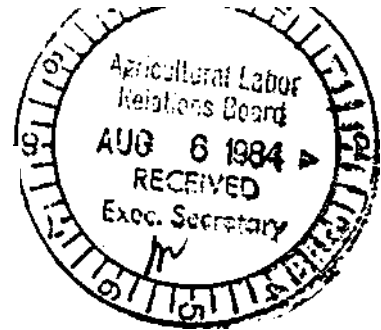
Member Waldie dissented. He would uphold the ALJ on the tractor driver issue based upon the adverse impact upon recalled tractor drivers. Member Waldie would reverse the ALJ's dismissal of the allegation regarding the failure to recall Crew No. 5. In his opinion the evidence demonstrated the employer inflated the sizes of existing crews so as to avoid recalling Crew No. 5.

* * *

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

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STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD



In the Matter of:
SAM ANDREWS' SONS,
Respondent,
and
UNITED FARM WORKERS
OF AMERICA, AFL-CIO,
Charging Party.

Case Nos. 82-CE-171-EC
82-CE-210-EC
83-CE-99-EC

Appearances:

Patricia Rynn, Esq.
Dressier, Quesenbery, Laws & Barsamian
Newport Beach, California
for the Respondent

Helene Cauchon
El Centro, California
for General Counsel

Before: James Wolpman
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

JAMES WOLPMAN, Administrative Law Judge: This case was heard by me on April 9, 10, 11 and 12, 1984, in El Centro California. It arose out of charges filed by the United Farm Workers of America, AFL-CIO ("UFW") alleging that Respondent Sam Andrews' Sons violated the Agricultural Labor Relations Act. The original complaint issued on June 15, 1983, and was amended twice. In its final, form -- a Second Amended Complaint, dated November 10, 1983 -- it alleges that Respondent violated Labor Code section 1153(e) and (a) by instituting unilateral changes in working conditions without first notifying and bargaining with the UFW. All of the alleged charges concern seniority rights: one has to do with layoffs in the irrigation crew; another with work assignments for tractor drives; and a third with the failure to recall a lettuce crew. Respondent denies that its conduct in any of the three instances amounted to a change in established practice, and hence denies that it was under any obligation to inform or bargain with the UFW about its actions.

I. JURISDICTION

Respondent is an agricultural employer. The UFW is a labor organization and, since August 21, 1978, has been the exclusive bargaining representative for Respondent's agricultural employees. The instant charges were filed and served in a timely manner.

II. RESPONDENT'S OPERATIONS

Sam Andrews' Sons is a partnership engaged in farming operations primarily in the Bakersfield and Imperial Valley areas-It has substantial acreages in both areas where it grows lettuce, melons and other vegetable crops as well as cotton, wheat and other

flat crops. (See Sam Andrews' Sons (1983) 9 ALRB No. 24, ALJD pp. 5-7.)

III. THE LAYOFFS OF GREGORIA CHABOLLA AND ELIZANDRO TRASLAVINA

General Counsel asserts that Respondent departed from its established layoff practice when it laid these two workers off out of seniority.

A. Findings

Gregorio Chabolla and Elizandro Traslavina are members of the irrigation crew. They are classified as shovelers; all of the other crew members are irrigators. (III:6-7.) Irrigators not only irrigate but also perform such tasks such as cleaning and spraying ditches and removing and repairing pipe. (I:60-62; 69.) Shovelers do all of these ancilliary tasks but do not irrigate. (I:73-74.)

Despite the differences between shovelers and irrigators, all are listed on a single, integrated crew seniority list and ranked according to dates of hire. (G.C. Ex. 3.) Traslavina, who was hired in 1978, and Chabolla, who was hired in 1979, have more seniority than some irrigators but less than others. (G.C. Ex. 3.)

In December 1982, both shovelers were laid off while other less senior irrigators were kept on. (Resp. Ex. A; 1:59-60.) Chabolla testified that prior to that time, seniority had always been followed in layoffs. (I:59.) His foreman, Leonides Madrigal, testified that seniority was only one consideration; anticipation of work to be done and the ability to those left to do it also entered into his determination of who was to be laid off. (III:22, 30-32.) In December 1982, Madrigal anticipated very little work, but

determined that the amount of expected irrigation necessitated the layoff of the two shovelers and the retention of irrigators junior to them in seniority. (III:28, 32.)

As it turned out, there was less irrigation work than anticipated. Madrigal explained that this was due to unexpected rains in mid-December. (III:28, 33.)

B. Analysis and Conclusion

General Counsel claims that this layoff deviated from the layoff of the previous December where seniority was followed, as well as the June layoffs in 1981 and 1982 where the practice was to layoff Chabolla and Traslavina "only when the majority of employees below them on the seniority list were also laid off." (G.C. Brief, p. 14.)

For a violation to be found, the General Counsel must prove that the respondent acted unilaterally to change "a term or condition of employment . . . established by past practice and/or contractual provision." (Tex-Cal Land Management, Inc. (1982) 8 ALRB No. 85, p. 5.)

Because the records belie Chabolla's testimony that seniority was always followed in layoffs (see Attachment D to G.C. Brief summarizing G.C. Ex. 4A and 4B), General Counsel has taken the Days Worked List and fashioned a principle consistent with the June and December 1981 and the June 1982 layoffs but not with the December 1982 layoff; namely, that shovelers are not laid off until a majority -- but not all -- of the less seniority irrigators are laid off. (Attachment D to G.C. Brief.) This, according to General Counsel, was the established practice which Respondent unilaterally

abrogated in December 1982.

While General Counsel's construct does have a certain heuristic elegance, it is without counterpart in any known seniority system. (See 2 BNA, Collective Bargaining: Negotiations and Contracts, Layoff, Rehiring and Work Sharing, Sec. 60; Slichter, Healy & Livermash, The Impact of Collective Bargaining on Management (1960), pp. 142-174; Speed & Bambrick, Seniority Systems in Non-unionized Companies, National Industrial Conference Board, Studies in Personnel Policy No. 110 (1950).) And it is difficult to understand why anyone would adopt such a middling principle.

The more reasonable explanation of what happened is Madrigal's. He kept Chabolla and Traslavina on as long as he could without impairing his anticipated irrigation needs. It so happened that in 1981 and 1982 he was able to do so until a majority of less senior irrigators were laid off, but in 1983 his anticipated needs asserted themselves earlier on. This is not a change in practice but merely change in one of the variables built into the existing practice.

It makes no difference that Madrigal's actual need for irrigators in December 1982 was less than expected. The layoff policy was -- quite reasonably -- based on anticipation, not actuality. When he laid off Chabolla and Traslavina on December 4, Madrigal could not be taxed with knowledge that mid-December rains would obviate the need for irrigation work.^{1/} Moreover, when the

1. General Counsel claims that Madrigal's testimony about the rain was fabricated. If so, it would have been easy enough to

(Footnote continued-----)

rains came, he violated no pre-existing practice by failing to recall the two. There was less non-irrigation work than in previous years -- barely enough to keep those who were already working busy (see 111:18-19, and Attachment E to G.C. Brief summarizing G.C. Ex-4); and, in that situation, practice dictated that those working be given precedence over those on layoff. (III:20-22.)

General Counsel has thus failed to show that the layoffs of Chabolla and Translavina resulted from a change in respondents established layoff practice. (See: Eazor Express Incorporated (1978) 238 NLRB 1165, 1166.) I therefore recommend dismissal of that allegation of the complaint. (G.C. Ex. 1-1, paragraph 9.)

IV. TRACTOR DRIVER HOURS AND ASSIGNMENTS

General Counsel asserts that tractor driver foreman Rudy Angulo made several changes in the working conditions of his drivers in order to give tractor work to his young son and additional shifts and preferred assignments to his son-in-law. Respondent denies that its foreman made any substantial modification in established practice in favor of his relatives.

A. Lawrence Angulo

1. Findings. Lawrence is Rudy Angulo's son. He is a 16 year old high school student (he was 14 at the time of the events in question). (III:78-79.) In line with Respondent's long standing

(Footnote 1 continued----

impeach it with meteorological records; yet this was not done. Furthermore, his explanation helps account for the fact that no irrigation work whatsoever was performed during the week ending December 19, 1982. (See Attachment E, p. 2, to G.C. Brief summarizing G.C. Ex. 4.)

practice of providing part-time employment for the children of foremen and supervisors -- a practice found non-discriminatory in Sam Andrews' Sons (1983) 9 ALRB No. 21, ALJD, pp. 67-68 -- he worked for his father after school, weekends and summers. He did a variety of odd jobs (III:42) and earned \$4.50 per hour as compared with \$5.33 to \$6.68 per hour for tractor drivers. (G.C. Ex. 10.) He is not classified as a tractor driver. (III:42.)

Nevertheless, on a number of occasions during the Summer of 1982, tractor drivers observed him knocking down the temporary earthen borders erected to irrigate fields using a tractor equipped with a special disc. (II:74-76, 92-93, 102-103, 114-116.) His father acknowledged seeing Lawrence knocking borders "a couple of times" (III:66-67), but explained that this was done without his permission and that, once he found out, he told his son, "You park that tractor. You don't belong here." (III:67.)

There is no dispute that knocking borders -- or "splitting borders" as it is also termed (III:74) -- is tractor driver work. Normally it is done by Patricio Parra, the most senior of the drivers (II:98); and its proper assignment is implicit in Rudy Arigulo's statement to his son, "You don't belong here."

2. Analysis and Conclusions. The alleged violation was prosecuted on the theory that working Lawrence out of classification interfered with the seniority rights of certain drivers. The defense was that General Counsel failed to prove that any of those drivers' seniority rights were affected by what happened.

Both the prosecution and the defense misconceive the issue. It is one of classification, not seniority. As a result of

established practice, certain work has come to "belong" to the drivers. Rudy Angulo said as much when he told his son to stop knocking borders. Their right to the work is an established concomitant of the job classification, and exists separate and apart from seniority. Even if Sam Andrews' had no seniority system, it still could not unilaterally take work away from drivers and give it to others.^{2/} Seniority is involved only consequentially: If the work had remained with the drivers, one of them would have gotten it; seniority determines who that would be.^{3/}

A limited defense can, however, be constructed out of Respondent's claim that no driver's seniority was affected by removing the work from the classification.^{4/} If all drivers were employed and working the maximum number of shifts at the time Lawrence knocked the borders, there would be a serious question as to whether established practice precluded Sam Andrews' from going outside of classification to get it done. But the tractor driver pool had not been exhausted. In every week from June 1 through September 26, 1982, there were tractor drivers who were not working

2. It is, of course, possible to have a job classification system in which one classification does not have exclusive claim to particular work; indeed, that appears to be the case with the ditch work done by both the irrigator and sprinkler crews. (III:7-8.) With tractor work, however, exclusivity is the established practice.

3. General Counsel's suggestion that this is a matter for compliance (Brief, p. 4, fn. 3) is correct and indicates an awareness of the proper relationship of seniority rights to classification rights.

4. The parties' failure to conceptualize the issue correctly does not preclude a decision; the underlying facts were fully litigated. Roberts Farms, Inc. (1983) 9 ALRB No. 27, ALJD pp. 23-26.

and/or who worked less than the full complement of 6 shifts. (G.C. Ex. 10, partially summarized in Appendix B, p. 3 of G.C. Brief.)

It is also possible to argue that the number of borders knocked by Lawrence was de minimus. (See Peter D. Solomon and Joseph R. Solomon d/b/a/ Cattle Valley Farms (1982) 8 ALRB No. 59, p. 3.) But the number of borders knocked from June through September 1981 (190 hours reported in G.C. Ex 11) and 1983 (250 hours reported in G.C. Ex 12), the unexplained drop in 1982 (50 hours reported in G.C. Ex 10),^{5/} and the number of times Lawrence was observed doing the work that year make the argument untenable.^{6/}

Finally, there is the argument that when Lawrence knocked borders he was "on a frolic of his own," acting without permission from his father.

While I believe that Lawrence began knocking borders without asking his father's permission and, further, that Rudy Angulo did eventually call a halt to his son's activity, he did not take effective action when he first became aware of what was going

5. While there is testimony that the number of borders knocked or split varies from year to year, there is no testimony that 1982 was lean year for this kind of work; in fact, one driver testified that the amount seemed constant from 1981 to 1982. (II:101.) Also one would expect a rough, but consistent relationship between borders made and borders knocked, but in the Summer of 1982 that relationship dropped drastically. (See Table on page 7 of the G.C. Brief, summarizing G.C. Exs. 10, 11 & 12.)

6. Respondent's contention that any one assignment to knock borders takes so little time that it is often not reported on the time card not only fails to explain the drop in work in 1982 (because such a phenomenon would operate equally each year), but establishes that the amount of border knocking or splitting is more significant than reported.

on. Both at the hearing and in March 1984 meeting when the drivers complained about Lawrence doing their work (II:84-85; 108-109) his attitude was dismissive; he left the definite impression that he considered the matter of little consequence. Then, too, he was conspicuously (and understandably) proud of his son's desire to do "a man's work." All this, taken together with the amount of tractor work Lawrence was observed performing and the care his father took as a supervisor to keep abreast of what was going on (III:38), lead me to the conclusion that, although he did not actually encourage his son, he did tolerate the performance of tractor work up to the point where he saw that it was going to create problems with the rest of the crew. By doing so, he altered the established practice of according tractor drivers the exclusive right to tractor work.^{7/} Because the change concerns a -mandatory subject of bargaining and was accomplished without notice or bargaining with the UFW (I:81-82), it constitutes a violation of section 1153(e), and derivatively section 1153(a), of the Act.

Because I accept Rudy Angulo's testimony -- fully corroborated by the 1983 time cards (G.C. Ex 12) -- that the misassignment was eventually corrected, no purpose would be served by ordering Respondent to bargain about the change; back pay for those who lost work because of the misassignment, a simple cease and desist order and appropriate notice to other employees will suffice

7. Both sides concede that, besides knocking borders, Lawrence moved wheel tractors around the area. The drivers were aware of this but registered no objection. I therefore conclude that moving the tractors is not an exclusive prerogative of the classification.

to remedy the violation. (See section VI, below.)

B. Rodney Larson

Rodney Larson is Rudy Angulo's son-in-law. (III:45.) Unlike Lawrence, he is a tractor driver. He was hired by his father-in-law in September 1983, and so occupies a position at the lower end of the tractor driver seniority list - 10th or 11th. (III:45, 51; G.C. Ex. 5B, p. 4.)

According to the General Counsel, Angulo altered established seniority practice by giving his son-in-law more shifts and better assignments than drivers with greater seniority.

1. Additional Shifts. The normal work week for tractor drivers is six 10 hour shifts. (II:109.) Angulo is responsible for shift assignments; however the drivers actually learn of their assignments from a chalkboard maintained by Efrain Silva, the shop foreman. (III:38-39.) Silva posts the assignments as he receives them from Angulo. (II:56.)

Angulo testified that he does not make assignments on the basis of seniority; rather they depend on what the driver is capable of and what he has done in the past. (III:82-83, and see III:78-79.) While none of the drivers who testified came out and said seniority was the sole criterion for assignments, all indicated that it played a significant role; (II:74, 97-98, 117-118) and all believed that Larson had gotten more than his fair share of 6 or 7 day work weeks. (II:81-83, 104, 117-118.)

The time cards and the days worked records are the best measure of whether, and to what extent, seniority determines assignments; and, if it does, whether it was ignored in Larson's

case. In attachments B and C to its brief the General Counsel has summarized the actual work weeks for each tractor driver in all of 1981, part of 1982, all of 1983 and the first 3 months of 1984 (based on Resp. Ex. B, G.C. Exs. 10, 11 & 12.)

These records reveal that seniority is not particularly significant in determining the number of shifts worked. In 36 of the 52 weeks of 1981, seniority was overlooked by giving less senior driver(s) at least one more shift than was given to those senior to them. This 69% deviation (36/52) is consistent: In 42 of the 65 weeks from January 1983 to March 25, 1984, the seniority principal was likewise overlooked -- a 65% deviation; and the same is true for 9 of the 13 weeks from July 4 to September 26, 1982, (a 69% deviation).

Looking at the data another way yields a similar result: If one adds up the total number of shifts worked by each worker in each period and then ranks the workers by the number of shifts worked, the ranking does not correspond to seniority. This can be seen from Table I which covers the period of Larson's employment. Calculation of the same figures using the 1981 and 1982 periods summarized by the General Counsel yields similar results.

This is not to say that seniority plays no role. The records disclose a loose co-relation between seniority and shifts worked; but because the co-relation is imperfect, a deviation would have to be fairly pronounced before it could be characterized as a modification, rather than a random or accidental departure from established practice.

The drivers believed that the deviation in Larson's case

TABLE I

TRACTOR DRIVERS: Shifts Worked Each Week from Week Ending September 18, 1983 to March 26, 1984. (Drivers listed left to right in order of seniority.*)

Week	Week Ending	Parra (1961)	Aguilar (1964)	Lazaro (1964)	Ramirez (1964)	Nunez (1965)	Valenciana (1973)	Lopez (1977)	Medina (1977)	Ablica (1979)	Martinez (1981)	Larson (1983)	X = Seniority Overlooked
1	9/18	6	6	6	6	6	6	6	6	6	6	3	
2	9/25	6	7	7	7	7	6	0	7	5	6	7	X
3	10/2	6	7	7	7	7	6	0	7	6	6	3	X
4	10/9	6	6	6	6	6	6	0	0	0	0	0	
5	10/16	6	6	5	6	6	6	0	0	0	0	0	X
6	10/23	6	6	7	6	6	6	4	4	5	7	0	X
7	10/30	6	6	6	6	6	6	6	6	6	7	6	X
8	11/6	6	6	6	6	6	6	6	6	6	7	6	X
9	11/13	6	6	6	6	6	6	6	6	6	6	5	
10	11/20	6	6	6	6	6	6	5	5	6	5	6	X
11	11/27	5	5	5	5	5	5	5	5	5	5	5	
12	12/4	6	6	5	5	6	5	5	5	6	4	5	X
13	12/11	6	6	6	6	6	6	6	6	6	6	6	
14	12/18	5	5	5	5	5	5	5	5	5	6	5	X
15	12/25	4	5	4	4	4	4	5	4	5	4	4	X
16	1/1	5	5	3	4	5	4	3	2	0	0	0	X
17***	1/15	6	7	6	6	6	6	6	3	7	7	7	X
18	1/22	6	6	6	6	6	6	6	6	6	6	6	
19	1/29	6	6	5	6	6	6	5	6	6	5	6	X
20	2/5	6	6	6	6	6	6	5	6	6	5	6	X
21	2/12	5	6	6	5	6	6	1	5	4	6	5	X
22	2/19	6	6	5	6	6	6	-	1	1	3	0	X
23	2/26	6	6	6	6	6	6	-	6	6	6	5	
24	3/4	6	6	5	6	6	6	-	6	6	5	0	X
25	3/11	5	6	5	5	5	3	-	1	1	1	1	X
26	3/18	7	7	6	6	6	6	-	6	6	6	7	X
27	3/25	6	6	6	6	6	6	-	6	6	6	6	
Total Number Shifts worked		156	162	152	155	158	152	85	126	128	133	109	
Number of Times Seniority Overlooked										8	11	7	19

*Francisco Morales excluded because retired in middle of period.

**The shading indicates that driver worked more shifts that week than at least one more senior working driver. Larson did so on 7 occasions Martinez on 11 occasions; and Ablica on 8 occasions.

was sufficiently pronounced so as to prove a modification in established practice. The records, however, fail to substantiate their belief. This can be seen from Table I: In the 27 weeks from September 1983, when he was hired, to March 26, 1984, Larson was assigned more shifts than drivers senior to him 7 on occasions. Enrique Martinez, the next driver up the seniority list, received more shifts on 11 occasions; and Pedro Abrica, the next up from Martinez, received more shifts on 8 occasions. A similar result obtains when Larson is ranked against the 11 drivers with more seniority in terms of total shifts worked. Table I has him finishing 10th; only Jesus Lopez, whose name drops off the time records on February 7, 1984, has less shifts.

The records, therefore, do not support the drivers' belief or the General Counsel's claim that seniority is a determinative factor in total shifts assigned or that Larson was treated differently in this regard than other workers. What they do illustrate is the danger -- in cases where cumulative actions over time are involved -- of relying on subjective impression. (See Mike Yurosek & Sons, Inc. (1982) 8 ALRB No. 37, ALJD p. 4.)

2. Preferred Assignments. For the most part drivers prefer wheel tractor assignments to caterpillar assignments because caterpillar work can be dirty and entails working some night shifts. (II:83, 104, 117.) They therefore objected to Angulo's practice of assigning his son-in-law exclusively to wheel tractor work, and they were especially upset when he transferred a senior driver, Filberto Valenciana, from sowing wheat with a wheel tractor to operating a caterpillar and assigned Larson to work in his place. (II:83, 105.)

Once again the basis of their complaint is the claim that established practice dictates that assignments be made by seniority. (II:74, 97-98, 117-118.) The drivers testified that traditionally, when new drivers were hired, they began with caterpillar work; then, as they accumulated seniority, they received more and more wheel tractor work. (II:83-84, 91.)

Angulo's response was twofold: He denied that seniority had any role in assignment (III:82), and he denied any uniform practice of starting new hires with caterpillar work. (II:45.) He explained that, although drivers usually began on the caterpillar, there had been at least two instances -- the hiring of Patricio Parra in 1961 and the hiring of Jose Aguilar in 1964 -- when a driver was hired to work exclusively on wheel tractors. (III:46.) In 1983, when he hired Larson, he needed a wheel tractor driver, and Larson had the requisite experience. (III:45, 68.) Angulo was uncertain of his ability to drive a caterpillar; and, on the occasion when he replaced Valenciana with Larson, he did so rather than risk damage to the equipment. (III:50-51, 78.)

The records are not as helpful here as they were in the previous alleged change. But Angulo's own testimony concerning the amount of caterpillar work performed by each driver does disclose a fairly consistent relationship between seniority and wheel tractor assignments (III:46-49), and thus calls into question his assertion that seniority has no role in those assignments.^{8/}

8. The relationship between seniority and assignment is complicated by the existence of two Tractor Driver classifications (I and II) which are defined by the kind of tractor driving performed, not by the amount of seniority accrued. (III:44-45.) While the more senior drivers are concentrated at the Tractor Driver I level, there are exceptions. (See G.C. Exs. 5A and B.)

Left unanswered, however, is his further assertion that some drivers have been hired exclusively for wheel tractor work. The witnesses who denied this and testified that all tractor drivers began by driving caterpillars were not employed when Parra and Aguilar -- who rank #1 and #2 seniority -- were hired. (G.C. Exs. 5A & 5B.) That leaves Angulo's as the only first hand account.^{9/}

Yet, in other testimony Angulo lacked candor: He denied that seniority had anything to do with the number of shifts assigned when the records show that it does, and he denied that it had any role in caterpillar assignments but then, in other testimony, revealed that it does. When he testified about his son's tractor work, his attitude was cavalier and his testimony misleading.

I am left in the perplexing situation of weighing unrefuted testimony from an unreliable witness against the testimony of .workers who could not have been present to observe what transpired and who, in other testimony, made assertions which time and work records fail to substantiate.

Because the burden of proving a unilateral change in established practice is with the General Counsel and because neither Parra nor Aguilar were shown to be unavailable as witnesses to refute Angulo's testimony, I find myself compelled to accept that

9. Even this is not entirely correct. Parra had already been working for one year when Angulo began work at Sam Andrews' Sons (G.C. Ex. 5A; III:37); so, strictly speaking, Angulo could only have had first hand knowledge that Parra was working exclusively on wheel tractors after one year. However, in view of the very gradual shift to wheel tractors by other drivers (see G.C. Brief, p.8, summarizing III:46-49), I find this sufficient to allow the inference to be drawn that Parra began as a wheel tractor driver. There is no time problem with Aguilar because Angulo hired him. (III:46.)

testimony. "The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse." (United States v. Interstate Circuit (1939) 306 U.S. 208, 226; Kophammer Farms (1982) 8 ALRB No. 21, p. 8; L.B. Foster Co. (1967) 168 NLRB 83, 86; Cal. Evid. Code, section 412.) I therefore conclude that the General Counsel failed to satisfy its burden of proof.

V. THE FAILURE TO UTILIZE LETTUCE CREW #5

General Counsel asserts that during the Spring 1983 lettuce harvest in Bakersfield Respondent altered its established practice by increasing the number of "trios" in Crews fl through #4 and that, as a result, the members of Crew #5 were deprived of the opportunity to work the harvest. Respondent again denies that it deviated from established practice and asserts that any differences in crew size and utilization were due to circumstances which it has traditionally taken into account in determining the required number of crews and trios.

A. Findings.

The composition and utilization of Respondent's lettuce harvesting crew was litigated in Sam Andrews' Sons (1983) 9 ALRB No. 24, and is presently before the Board by way of exceptions to the Administrative Law Judge's Decision in Sam Andrews' Sons, 80-CE-143-EC, et al. (July 29, 1983).^{10/}

10. The parties stipulated that I could rely on the ALJ's Decision in 80-CE-143-EC, et al. for convenience in understanding Respondent's practice. (I:80-81.)

Those cases and the evidence here presented establish that Respondent has up to five crews available to harvest lettuce at each of its locations. Established practice calls for crews to begin work in ascending order: First, Crew #1, then, one after another, Crews #2, #3 and #4, and, finally, Crew #5. (II:3.) In actual practice, Crews #1 and #2 usually start at the same time, Crews #3 and #4 start a short while later, and Crew #5 follows if needed. (II:18.)

The composition of each crew varies from location to location because crew membership is based not on overall crew or company seniority, but on seniority gained in a crew during previous harvests at that location. (II:3-4.) Nor does a worker gain membership in a preferred, low-numbered crew by acquiring seniority in a higher-numbered crew; in fact, the company discourages such progression because it tends to weaken the composition -- and performance -- of the higher-numbered crews. (II:30-31.) Vacancies are therefore frequently filled from outside. Because of this, Crew #5 members can accumulate considerable crew or company seniority, yet earn less than junior employees fortunate enough to have found a sinecure in a lower-numbered crew.

Normal fluctuations in crew size occur because the number of trios -- each made up of two cutters and a packer -- is allowed to increase or decrease to accommodate harvesting needs.^{11/} Crew size is further complicated because different crews are of different sizes. Sam Andrews' has traditionally permitted two crews -- #2 and

11. Crews also contain closers and loaders, but their numbers, 3 and 4 respectively, tend to remain fairly constant.

#4 which are predominantly Filipino in composition a greater number of trios. (II:16, 46.) This is done to provide an incentive to the foremen of those crews who, unlike the foremen of the three predominantly Mexican crews (#1, #3 and #5), are paid on a per carton basis.^{12/} (II:15-16.)

Respondent's lettuce harvest supervisor, Ed Rodriques, is responsible for determining the number of trios per crew. (II:17; 9 ARLB No. 24, ALJD pp. 144-145.) Before the crews move into a harvest location, he tells each foreman the number of trios he wants. (II:27; G.C. Ex. 8, p. 42-43.) The foremen, in turn, use the Days Worked Lists from the previous season to fill their allotments.^{13/} (II:37.) Usually, but not always, crews begin with a minimum number of trios, expand as harvest needs increase, and then decrease as the harvest concludes. (Table III, below.)

Price and maturation are the principle determinants of whether trios are added or subtracted. (II:18, 63.) If the price of lettuce — something which can vary from day to day or week to week (see 9 ARLB No. 24, ALJD p. 137, fn. 133) — is low, Rodriques will try to schedule production so as to cut the minimum amount required to avoid spoilage. (II:63.) Should the price increase, he will act to increase production. As the season progresses and more

12. Another difference between the Mexican and Filipino crews is that the closers in the Filipino crews are paid in the same manner as the trios. Because of this they were included in the crew lists for the Spring and Fall of 1980 (G.C. Ex. 2, pp. 1-43); in subsequent years, they have been separated out. The net effect is to overstate slightly the number of trios in Crew #2 and #4 for the Spring and Fall of 1980. (See Table III, below.)

13. They may actually recruit more workers than instructed because of anticipated failures to appear. (See II:36.)

and more lettuce requires harvest, increases in production are less the product of price and more the result of the need to cut the lettuce before it spoils. (I:52.)

Increasing or decreasing the number of trios is only one available option. Rodriques can vary the length of the shift so that crews work anywhere from 4 to $9^{1/2}$ hours per day (II:56-57); he can shorten or lengthen the work week from 1 or 2 days up to 6 days a week (G.C. Ex. 2); or he can bring in another crew (II:17). Each of these options has its limitations and its advantages and disadvantages. If all the crews are working near capacity, adding trios may be unwise because supervision will be spread too thin (II:43-44); the better solution is to add another crew. On the other hand, where there is unused capacity or price uncertainty, the expense of adding and maintaining another crew can present a considerable risk.

Nor are price and maturation the only variables which Rodriques takes into account. Unseasonable weather, late maturing fields, and abnormal worker turnover can also effect crew size and utilization. (II:18-20, 31, 69-70.)

Still and all, it would be wrong to think Rodriques at sea in an ocean of uncertainty. He is an experienced harvest supervisor who has confronted with all of these problems before and has become adept at anticipating and handling them. (II:61.) Besides, the flexibility he has under established company practice in scheduling hours per shift, shifts per week, trios per crew, and crews per season allow plenty of leeway for dealing with changing conditions.

B. Analysis, Further Findings and Conclusions of Law

The critical issue here is whether, in the Spring 1983 Bakersfield harvest, Rodriques went beyond the flexibility inherent in established practice in expanding Crews 11 through #4 and not working Crew #5. But before turning to that harvest, it is important to appreciate the historical pattern of variations in crew size and crew utilization.

1. Previous Seasons. In considering historical patterns, there is always the threshold question of how far back to go. In 9 ALRB No. 24, the Board affirmed the Administrative Law Judge's finding that prior to 1980 Respondent had no well established practice with respect to the recall of crews, especially Crew #5. (ALJD P. 101.) For that reason, the parties refrained from placing before me any substantial evidence of Respondent's practice prior to 1980 (II:1-2); and I have therefore not relied on pre-1980 conduct as probative of post-1980 practice.

The Spring and Fall 1980 harvests are another matter. General Counsel claims that it would be inappropriate to rely on crew size or utilization during those harvests because Respondent was in the process of reorganizing its crews. Respondent, on the other hand, asserts that the 1980 re-organization concerned the method by which workers were selected for hire and had nothing to do with crew size or with the number of crews utilized.

What happened was this: In 1979 there had been a number of work stoppages which were ultimately found unprotected. (9 ALRB No. 24, pp. 17-18.) Respondent was therefore allowed to create and rely upon "preferential hiring lists" which eliminated the pre-1979

seniority of those who had participated in the stoppages, but permitted their recall as new employees. (9 ALRB No. 24, ALJD pp. 145-149, 169.) These lists were used in combination with the traditional Days Worked Lists (applicable to non-strikers) to select crew members. By 1981 the preferential lists were exhausted, and the Days Worked Lists again became the exclusive method of recall. (II:14; G.C. Ex. 8, p. 70.)

This case has nothing to do with the composition of the crews, only with their overall size and utilization. Because there is no evidence that resort to the preferential lists did anything more than determine who was hired, I find Respondent's practices the Spring and Fall of 1980 relevant and material in framing the historical context in which its actions during Spring 1983 are to be judged.

This finding has a significant corollary: Spring and Fall 1980 were the only other seasons when Crew #5 was not used. (1:35; see G.C. Ex. 2.) Had they been eliminated from consideration, General Counsel's argument that established practice entitles Crew #5 to be called every season as a matter of course — i.e., that it was not a "booster" crew — would be much more compelling. However, once those seasons are factored in, the force of that argument is dissipated, and the focus of inquiry shifts to the more difficult question of whether the amount of work performed in Spring 1983 was enough to require the utilization of a fifth crew. Historical variations in crew size and utilization provide the perspective necessary to answer that question.

Although crew size was the subject of considerable

testimony, it *is* less reliable than the information which can be extracted from the crew records for the past four years. (G.C. Ex-2.) Those records indicate that since 1980, Crews #1 and #3 (the Mexican Crews) have fluctuated in size anywhere from 7 to 11 trios, with 8 to 10 being the usual number and 7 and 11 occurring infrequently -- 7's at the beginning and end of seasons and 11's at peaks.^{14/} Crew records for Crews #2 and #4 (the Filipino crews) show fluctuations of anywhere from 8 to 13 trios per crew, with 10 to 12 being the usual number and 8, 9 and 13 occurring infrequently -- 8's and 9's at the beginning and end of seasons and 13's at peaks. In the seasons in which Crew #5 was utilized, its size has varied from 4 to 9 trios, with 8 or 9 being typical and 4 to 7 being less frequent -- usually, but not always, occurring at the beginning or end of seasons.

As for crew utilization, it has already been noted that Crews #1 and #2 usually begin the season together with Crews #2 and #4 being called in about a week later. In 3 of the 8 seasons between Spring 1980 to Fall 1983, Crew #5 was not used at all (Spring and Fall 1980 and Spring 1983). In the 5 seasons it did work, it began anywhere from a week to two weeks after Crew #4 and its work coincided with the two or three peak weeks of the harvest.^{15/} The elimination of crews at the end of a season is, for

14. The method of calculating the number of trios from the Days Worked Lists is explained in the comment to Table III, below. The Table itself shows the calculated number of trios per crew during each week of each season.

15. As used in this decision, the word "peak" refers to the size of the workforce and not to the amount of lettuce

(Footnote continued-----)

the most part, much less gradual than their introduction; seldom does more than a few days elapse between the layoff of Crew #4 or f5 and the layoff of Crew #1.

2. Spring 1983. The 1983 Spring Harvest in Bakersfield was unusual in a number of respects. This can be seen in Table II: The harvest was spread over 10 weeks -- three more than any previous season and four more than the average; the total number of shifts worked exceeded any previous season by almost 1000; and it was the first time that crews were called back to harvest a late maturing field after the season closed. There were other differences as well: The season began abruptly with Crew #1 starting on a weekend and working at peak size (Table III; II:24-25), and there were two periods during which work was halted -- once early in the season and again at the end while waiting to harvest the late field. (II:66-67.)

All of these circumstances are of consequence in evaluating crew size and utilization. The number of shifts worked would, standing alone, augur the use of a fifth crew. The length of the season, on the other hand, suggests that, with more time to do the work, fewer workers would be needed. So, too, with the shutdowns early and late in the season, they point up the risk of having too many crews on hand.

Taking these factors into account, the failure to utilize

(Footnote 15 continued-----)

harvested. At hearing, it was sometimes used in one sense and sometimes in the other. While production figures might have been of assistance in assessing the reasonableness of some of Rodriques decisions, the Days Worked Lists are more helpful overall.

Crew #5 at the beginning or end of the season is understandable. Although the harvest had a promising start -- Crew #1 began on a weekend with 10 trios -- by the third week production had dwindled to the point where a temporary shutdown was required. (II:61-62.) Likewise, with Rodrigues' decision not to use Crew #5 at the end of the season to help with the late maturing field. Only one week of work was required (See Table III below and G.C, Ex. 2), and he legitimately believed that he had enough workers. He could not be expected to anticipate the extent to which they would be lost to other jobs opening up in other areas. (II:28-30; 34-35.) Moreover, at no time had Crew #5 been used at the beginning of the harvest and seldom had it been used at the end. Except for Fall 1982, it has been confined to the peak two or three weeks. (I:28; G.C. Ex. 2.) Therefore, it is to the peak weeks of Spring 1983 that we must look in order to determine whether a violation occurred. That being so, the issue here can be further refined as follows: Given the flexibility inherent in established practice and given the amount of work actually performed during the peak two or three weeks of the harvest,^{16/} did the failure to decrease the number of trios in the other crews and utilize Crew #5 constitute a change in policy?

16. It is possible to argue that, had Crew #5 been brought in, more shifts would have been worked during those three weeks, thus shortening the season and providing more work for Crew #5; but to tamper with the number of shifts worked is to second guess Rodrigues' decision on how much lettuce to cut. This I decline to do. There is no indication that considerations other than price, maturation and the other traditional factors played a role in his decision.

3. Comparison with Other Seasons. The shaded portions of Table II focus on the peak periods and contain the information needed to compare the shifts worked during the Spring 1983 peak with the shifts worked in other seasons, both week by week and season by season. The Table makes it clear that the 2454 shifts worked during the Spring 1983 peak place it more in the realm of a five-crew season than a four-crew season. One hundred ninety-seven more shifts were worked than during the next largest four-crew season (Fall 1980), and only one other five-crew season (Fall 1983) had more shifts (2462). So, too, when shifts per week are compared: Only in the busiest week of one other four-crew season (Fall 1980) were more shifts worked (797) than during the slowest week of the Spring 1983 peak (Week #6 - 780 shifts); and the 830 shifts worked in Week #4 by four crews exceeds the number of shifts worked in that week in every one of the five-crew seasons. Even the 5th week of Spring 1983 (844 shifts) is average for that week for a five-crew season.

Numbers do not, however, tell the whole story. In Fall 1980, four crews worked 2257 shifts during peak, while in Spring 1982 five crews accounted for only 2170 shifts, and almost the same number of shifts were worked in Fall 1980 (2257) as in Fall 1981 (2299), yet only four crews worked the former season while five worked the latter.

There is, then, no fixed cut-off point beyond which Crew #5 must be utilized. The system admits of more flexibility than that. Still and all, the Spring 1983 numbers are larger than any previous four-crew season and do indeed test the limits of the flexibility

TABLE II

LETTUCE HARVEST CREWS: NUMBER OF SHIFTS
WORKED EACH WEEK BY ALL CREWS

SEASON (Peak three weeks)	WEEK	WEEK	WEEK	----- PEAK-----			WEEK	WEEK	WEEK	WEEK	TOTAL	TOTAL PEAK THREE WEEKS	DID CREW #5 WORK
	#1	#2	#3	WEEK #4	WEEK #5	WEEK #6	#7	#8	#9	#10			
SPRING 1980 (4/1, 4/8, 4/15)			155	611	650	713	402				2,531	1,974	No
FALL 1980 (11/4, 11/11, 11/18)		289	551	694	766	797	164				3,261	2, 257	No
SPING 1981 (4/7, 4/14, 4/21)			588	816	882	668	533				3,507	2,366	Yes
FALL 1981 (11/10, 11/17, 11/24)		123	562	825	803	671					2,984	2,299	Yes
SPRING 1982 (4/11, 4/18, 4/25)		451	386	702	690	778	655				3,662	2,170	Yes
FALL 1982 (11/7, 11/14, 11/21)		131	519	786	888	629	575	369			3,897	2,303	Yes
SPRING 1983 (4/8, 4/15, 4/22)	60	452	505	830	844	780	373	143	0	772	4,759	2,454	No
FALL 1983 (1/4, 11/11, 11/18)		273	522	749	955	758					3,257	2,462	Yes

inherent in established practice.

Those limits are further explored in the shaded portion of Table III which shows the variations in the number of trios assigned to each crew during the peak. For each season and each week within a season the Table lists the number of trios in Crews #1 and #3 (Mexican Crews), followed by Crews #2 and #4 (Filipino Crews), and then by Crew #5.

The significant trio numbers for Crews #1 and #3 during the Spring 1983 peak are 10, 10, 11, and 11, 11, 9. When these are compared with other years, we see that they exceed Fall 1983 -- 9, 10, 9 and 9, 10, 10 -- by 5 trios. However, the maximum number of trios worked by any Mexican crew in any single week of Spring 1983 # 11-- does not exceed the maximum worked in two other harvests -- Fall 1980 and Fall 1982 -- when 11 trios also worked, albeit only for a single week.

Turning to the Filipino crews, the significant trio numbers during the Spring 1983 peak are 13, 13, 12 and 13, 13, 12. When they are compared with other years, we see that they exceed Spring 1981 - 12, 12, 12 and 13, 12, 11 -- by 4 trios and Spring 1980 -- 11, 13, 14 and 10, 12, 11 -- by 5 trios. However, neither Crew #2's nor Crew #4's Spring 1983 individual total (13, 13, 12) exceeds Crew #2's Fall 1980 total (13, 13, 13), and neither is greater than Crew #2's Spring 1980 total (11, 13, 14) or Crew #4's Fall 1983 total (13, 13, 12). Furthermore, at no time in Spring 1983 did Crew #2 or #4 have more than 13 trios in a single week -- a number equaled or exceeded no less than seven times in other seasons. (Table III, shaded portion.)

EXPLANATION OF TABLE III

The records themselves (G.C. Ex. 2) do not contain the actual number of trios working in each crew; rather they indicate the number of days worked per week by each cutter and packer in each crew. Because of worker turnover, the number of trios per crew cannot be obtained by simply counting up the cutters and packers and dividing by 3. Instead, it is necessary to total the number of shifts worked by each crew and divide by the number of days in the particular week (which may vary from 2 to 6 days), to get the average number of shifts worked per day – a figure which is equivalent to the average number of cutters and packers working each day. The result can then be divided by 3 to obtain the average number of trios at work each day during the week. Decimals or fractions indicate either that some trios were incomplete (i.e., contained only two workers) or that some trios worked less than a full week (i.e., less than the number of days worked by most of the trios in the crew during that week). Here, where ever a decimal or a fraction is one-half or more, the number of trios has been rounded off to the next higher number.

Two examples should be enough to clarify the method utilized: In Crew #1 during the Fall 1982 harvest (week ending II/14) 21 workers worked 6 days, 5 worked 5 days, 5 worked 2 days, and 2 worked 1 day, for a total of 163 shifts worked. That 21 workers worked 6 days indicates the crew had a 6 day week; shorter work weeks for some workers can be attributed to turnover. Dividing the 163 shifts by the 6 day week yields an average of 27.16 shifts, which is the same as saying that 27 cutters and packers worked each day. Dividing 27 by 3 is 9, which means that 9 trios were at work each day. Using the same method for the following week, the result is 129 shifts worked during a 4 day week, or an average of 32.25 shifts (workers) on each of the 4 days. This comes to 10.75, or 12 trios for each of the 4 days.

The General Counsel has a different method which yields roughly the same results for 4-6 day work weeks but is less accurate for trios working 1-3 day work weeks. (See Appendix F-3 of G.C. Brief.) Neither procedure is perfect because of the incidence of occasional two person trios. It should also be remembered that the Table shows only how many trios worked in each crew during a particular work week; it does not indicate the length of the week (i.e., it will show 8 trios regardless of whether the 8 worked a 2 or 6 day work week); during peak this makes little difference because all weeks are full weeks.

TABLE III

LETTUCE HARVEST CREWS: NUMBER OF TRIOS WORKING
IN EACH CREW DURING EACH WEEK

SEASON AND CREW NOS.	WEEK #1	WEEK #2	WEEK #3	- - - - WEEK #4	-PEAK- WEEK #5	- - - - WEEK #6	WEEK #7	WEEK #8	WEEK #9	WEEK #10
SPRING 1980			7	8	8	8	8			
Crew #1			6	6	6	6	6			
Crew #3			13	11	13	14	13			
Crew #2			0	10	12	11	11			
Crew #4			0	0	0	0	0			
Crew #5										
FALL 1980		10	9	9	10	10	9			
Crew #1		7	8	9	10	11	11			
Crew #3		11	13	11	13	13	14			
Crew #2		0	0	8	10	10	11			
Crew #4		0	0	0	0	0	0			
Crew #5										
SPRING 1981			9	9	8	8	9			
Crew #1			9	8	9	7	7			
Crew #3			13	12	12	12	11			
Crew #2			11	13	12	12	9			
Crew #4			0	10	9	11	0			
Crew #5						0				
FALL 1981		9	9	9	9	9				
Crew #1		0	7	9	9	8				
Crew #3		12	12	12	12	12				
Crew #2		0	12	12	11	10				
Crew #4		0	0	5	5	4				
Crew #5										
SPRING 1982		8	8	8	8	8	8			
Crew #1		9	8	8	8	8	8			
Crew #3		13	11	11	11	12	11			
Crew #2		0	10	12	12	10	9			
Crew #4		0	0	0	7	8	0			
Crew #5										
FALL 1982		13	8	9	9	11	9	6		
Crew #1		0	8	8	9	10	9	7		
Crew #3		9	11	12	12	12	13	12		
Crew #2		0	10	11	11	12	0	0		
Crew #4		0	0	9	9	8	8	5		
Crew #5										
SPRING 1983	10	9	9	10	10	11	10	11	0	9
Crew #1	0	8	9	11	11	9	8	0	0	8
Crew #3	0	12	11	13	13	12	12	13	0	13
Crew #2	0	0	12	13	13	12	11	0	0	9
Crew #4	0	0	0	0	0	0	0	0	0	0
Crew #5										
FALL 1983		8	9	9	10	9				
Crew #1		0	8	9	10	10				
Crew #3		8	9	9	12	11				
Crew #2		0	9	9	9	12				
Crew #4		0	0	13	9	12				
Crew #5				6		9				

4. Concluding Findings. The numbers found in the Tables and in the Days Worked Lists can be analyzed and compared in still other ways (see Appendices F-1 to F-4 of G.C. Brief), but the result always comes down to this: In the Spring of 1983 each crew had, all totaled, more shifts and more trios, but in no individual week did it ever exceed the maximum number of trios found in other seasons. Therefore, if a violation is to be found, it exists, not because the maximum number of trios per week was exceeded but because the established maximum was maintained a week or so longer than ever before.

Deciding how much is too much can be very difficult; and here the question is a close one. Two facts tip the scale in favor of the Respondent and persuade me that established practice was not abrogated. The first is the unquestioned uncertainty which Rodrigues experienced at the beginning of the season in deciding whether or not to utilize Crew #5. (I:29-31, 36, 42-43; II:18; IV:12-13.) The second is that the pattern followed in Spring 1983 did not recur in the Fall. (See Table III.) His uncertainty convinces me that there was no preconceived plan to avoid the use of Crew #5, and makes it more likely that when his decision was made quickly, three weeks into the season, it represented a legitimate attempt to take into account the variables inherent in established practice -- variables which were then immanent in the circumstances surrounding the harvest. This, I find, was born out the following season when crew sizes were not maintained so long at maximum and Crew #5 was utilized. Had there been a change in policy, one would have expected the pattern of the preceeding Spring to emerge as a

trend, but that did riot happen.^{17/} I therefore conclude that Spring 1983 was an unusual season that taxed, but did not exceed, the limits of the flexibility inherent in Sam Andrews' Sons practice with respect to crew size and utilization.

In its opening brief, Respondent suggests that it had no established policy and was therefore entitled to utilize crews and assign trios as it saw fit without incurring any obligation to bargain. It also argues that, regardless of whether or not it had a policy, the vagaries of agriculture are such as to make decisions over crew size and utilization beyond the reach of the bargaining obligation.

I decline to accept either argument. Respondent does have a policy; and, while it is flexible, it does have limits. Had those limits been exceeded, there would have been a material change in a mandatory subject of bargaining – crew size and utilization – and a violation would have been found. As it happened, they were not exceeded. This recommended decision should be read no more broadly than that.

Finally, Respondent asserts that the doctrines of res judicata and collateral estoppel operate as a bar to the instant litigation insofar as it concerns the failure to utilize Crew #5.

While it is true that collateral estoppel does come into play with respect to some of the matters considered in this

17. I am aware of another possible interpretation of the return to normalcy in Fall 1983; namely, the filing of unfair labor practice charges over what had occurred. (G.C. Ex 1-C.) But, except for the fact that those charges preceeded the Fall harvest, there is nothing in the record to favor such an interpretation; and, without more, I am unwilling to do so.

proceeding (e.g., the propriety of the use of preferential hiring lists in 1980), neither it nor the more restrictive doctrine of res judicata reach the crucial issue of whether Respondent's conduct during the 1983 Spring harvest constituted a violation of the Act for the simple reason that the facts of that harvest have never been before the Board.

For the reasons here stated, I conclude that there was no violation of Section 1153(e) or (a) of the Act with respect to crew assignment or utilization during the 1983 Spring Harvest in Bakersfield, and I recommend that Paragraph 11 of the Second Amended Complaint be dismissed.^{18/}

VI. REMEDY

The single violation I have found involves a unilateral change -- Rudy Angulo's conduct in allowing his son to perform tractor driver work -- which was rescinded in 1983. Therefore, as I noted earlier, no purpose would be served by ordering Respondent to bargain about the change; back pay and a cease and desist order will suffice. Furthermore, because the unilateral change was confined to Angulo's crew, was undertaken with no encouragement or condonation from elsewhere in Respondent's hierarchy, and was rescinded early

18. At hearing General Counsel raised the question of whether Respondent's conduct during the Spring 1984 Bakersfield harvest constituted a separate or continuing violation, and I admitted some testimony and some records concerning that harvest, but General Counsel did not pursue the matter in its brief. Because the harvest was still in progress at the time of the hearing, the testimony and records cover only the beginning of the season. The matter could only have been fully litigated if records and testimony encompassing the full season were before me. I therefor decline to make finding or conclusions one way or the other with respect to that harvest.

on, the violation is so circumscribed that no legitimate purpose would be served by extending the mailing and reading requirements beyond the workers over whom Angulo exercised authority; namely, tractor drivers and shop employees.^{19/} (III:37-38.)

I recommend dismissal of the complaint with respect to all allegations thereof in which the Respondent has been found not to have violated the Act.

Upon the entire record, the findings of fact and conclusions of law set forth above, I issue the following:

RECOMMENDED ORDER

By authority of Labor Code section 1160.3, Respondent, Sam Andrews' Sons, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Assigning tractor driver work to employees who are not classified as tractor drivers without first notifying and affording the UFW a reasonable opportunity to bargain with Respondent concerning such change(s).

(b) In any like or related manner interfering with, restraining, or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Act.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Make whole its affected tractor drivers for all economic losses they suffered during the summer of 1983 as a result

19. Because tractor drivers are assigned work throughout Respondent's Imperial Valley operation, I have refrained from so limiting the posting requirement.

of allowing tractor driver work to be performed by an employee who was not a tractor driver, plus interest thereon computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(b) Preserve and, upon request, make available to this Board or its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the makewhole and backpay amounts, and interest, due under the terms of this Order.

(c) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(d) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all tractor drivers and shop employees employed by Respondent in its Imperial Valley operations at any time since June 1, 1983, until the date on which the said Notice is mailed.

(e) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

(f) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in a all

appropriate languages, to the persons described in paragraph (d) above who are then employed by Respondent on Company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading the Board agent shall be given opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

(g) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, fo the steps Respondent has taken to comply therewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

DATED: August 6, 1984

A handwritten signature in dark ink, appearing to read 'J. H. Wolpman', is written over a horizontal line.

JAMES H. WOLPMAN
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we had violated the law. After a hearing in which each side had a chance to present evidence, the Board has found that we violated the Agricultural Labor Relations Act (Act) by assigning tractor driver work to an employee who was not a tractor driver without first notifying the United Farm Workers of America, AFL-CIO (UFW) as your representative. The Board has told us to post and publish this Notice and to mail it to certain of those who worked for us between June 1, 1983 and the present. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

WE WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

WE WILL REIMBURSE those tractor drivers who suffered economic losses as a result of the failure to assign them certain work to which they were entitled.

WE WILL NOT make any change(s) in the terms or conditions of employment of any of our agricultural workers without notifying the UFW and giving it an opportunity to bargain about such change(s).

Dated:

SAM ANDREWS' SONS

By: _____
(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centro, California 92243. The telephone number is (714) 353-2130.

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE